

**CASE NO. 08-16753-G  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**IN RE: JANIS W. STEWART, ET AL.**

---

**On Petition for Writ of Mandamus to the United States  
District Court for the Middle District of Florida**

---

**DEFENDANT PHILIP COON'S REPLY TO  
PETITIONER-BORROWERS' RESPONSE TO  
PETITIONS FOR REHEARING AND REHEARING EN BANC**

---

**Katherine Earle Yanes  
Florida Bar No. 159727  
James E. Felman  
Florida Bar No. 0775568  
Kynes, Markman & Felman, P.A.  
P.O. Box 3396  
Tampa, FL 33601-3396  
(813) 229-1118**

**Attorneys for Defendant Philip Coon**

In Re: Janis W. Stewart, et al.  
Appeal No. 08-16753-G

**CERTIFICATE OF INTERESTED PERSONS AND**  
**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Local Rule 26.1, I hereby certify that the following is a list of all persons and entities that have an interest in the outcome of this case:

1. Albritton, A. Brian, United States Attorney, district court counsel for the United States
2. Allen, Todd, Appellant
3. American Mortgage Link
4. Applestein, Judith G., Appellant
5. Bab, Fred, Appellant
6. Barber, Robert W., Appellant
7. Bedke, Rachelle DesVaux, Assistant United States Attorney, district court counsel for the United States
8. Bhatia, Jasbir, Appellant
9. Bhatia, Subir, Appellant
10. Bierschbach, Martin, Appellant
11. Bivens, Andrea J., Appellant
12. Blake, Richard, Appellant

13. Brown, Paula, Appellant
14. Buckbee, Wesley N., Appellant
15. Buckbee, Robin, Appellant
16. Bustani, Diogo, Appellant
17. Butler, Linda M., Appellant
18. Butler, Norman R., Appellant
19. Calabrese, Anthony, Appellant
20. Califano, Michael J., Appellant
21. Capps, Tennie A., Appellant
22. Cassell, Paul G., Counsel for Appellants
23. Chaignet, Gloria A., Appellant
24. Coast Bank of Florida (now First Banks, Inc.)
25. Coon, Philip William, Defendant
26. Cordeiro, Christopher, Appellant
27. Cruz, Johanna, Appellant
28. Cruz, Juan, Appellant
29. Cuza, Manuel, Appellant
30. Deakins, Beverley, Appellant
31. Deakins, John P., Appellant

32. Debonis, Keith A., Appellant
33. DeSalvo, Karen R., Appellant
34. Dick, Marina, Appellant
35. Donahue, Sally M., Appellant
36. Dorcey, Michael J., Appellant
37. Dorcey, Telma L., Appellant
38. Downs, Denise, Appellant
39. Drane, Shannon S., Appellant
40. Felman, James E., Counsel for Defendant Philip W. Coon
41. Forsythe, Bruce J., Appellant
42. Gabriele, Angelo, Appellant
43. Gabriele, Salvatore, Appellant
44. Garden, William R., Appellant
45. Gardner, Kristian, Appellant
46. Gardner, Kymberly, Appellant
47. Garvin, Meg, National Crime Victim Institute, Counsel for Amicus  
Curiae
48. George, Russell E., Appellant
49. Gindin, Clifford, Appellant

50. Glenn, Joshua P., Appellant
51. Gontmacher, Ilya, Appellant
52. Griskevitch, Gloria, Appellant
53. Gupta, Samit, Appellant
54. Haefeli, Robert J., Appellant
55. Hamudot, Josef, Appellant
56. Harari, Malka, Appellant
57. Hatch, Stephen MacLaren, Appellant
58. Heiman, James, Appellant
59. Heinz, Stephen, Appellant
60. Holler, Marvin G., Jr., Appellant
61. Horner, Kelly, Appellant
62. Horner, Michael, Appellant
63. Huerta, Marcelino J., Counsel for Defendant Philip W. Coon
64. Jackson, Leslie, Appellant
65. Jackson, Marilyn, Appellant
66. Johnson, Zaniel, Appellant
67. Jones, Kathleen M., Appellant
68. Jones, William E., Appellant

69. Kass, Ross, Appellant
70. Kennedy, Elaine, Appellant
71. Kennedy, Kenneth, Appellant
72. Kew, Simon, Appellant
73. Kovachevich, The Honorable Elizabeth A., United States District Judge
74. Kreminski, Paul, Appellant
75. Lorenz, Barbara K., Appellant
76. Lorenz, Dale, Appellant
77. Maggi, Kathleen, Appellant
78. Maggi, Linda M., Appellant
79. Mahoney, Stephanie, Appellant
80. Massengill, Billy, Appellant
81. Massengill, Kathleen, Appellant
82. McCall, Micheal L., Appellant
83. McCoun, The Honorable Thomas B., III, United States Magistrate Judge
84. McGavern, Timothy D., Appellant
85. McMackins, Russell, Appellant
86. Michels, Kenneth J., Appellant
87. Miller, John Robert, Alleged Co-Conspirator

88. Mills, Bryan, Appellant
89. Mobley, Alan A., Appellant
90. Mobley, Terry N., Appellant
91. Moody, The Honorable James S., Jr., United States District Judge
92. Moransky, Ryan W., Appellant
93. Mousseau, Gary, Appellant
94. Mousseau, Jean, Appellant
95. Mraz, Anita L., Appellant
96. Mraz, Thomas A., Appellant
97. Muqbel, Ahmad M., Appellant
98. Muqbel, Kathy J., Appellant
99. Nelson, Brian W., Appellant
100. O'Keefe, Michael L., Appellant
101. Okas, Maria D., Appellant
102. Okas, Priit, Appellant
103. Pachino, Richard, Appellant
104. Palisi, James T., Appellant
105. Palisi, Nancy B., Appellant
106. Perez, Bernardo, Appellant

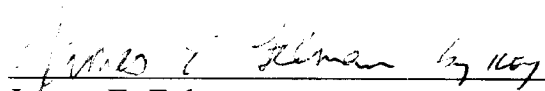
107. Peterson, Mary L., Appellant
108. Pilcher, Ian, Appellant
109. Pineda, Romeo S., Appellant
110. Pinero, Janice A., Appellant
111. Pino, Joseph M., Appellant
112. Pino, Joseph, Jr., Appellant
113. Pino, Marina C., Appellant
114. Pino, Paula, Appellant
115. Pizzo, The Honorable Mark A., United States Magistrate Judge
116. Porfirio, Jeff, Appellant
117. Poxon, Allan W., Appellant
118. Poxon, Ross, Appellant
119. Price, Daniel, Appellant
120. Price, Patricia, Appellant
121. Prowak, James, Appellant
122. Prowak, Robert, Appellant
123. Rana, Nitin, Appellant
124. Rhodes, David P., Assistant United States Attorney, appellate counsel  
for the United States



125. Romera, Lorraine, Appellant
126. Romera, Robert, Appellant
127. Ryan, Jim, Appellant
128. Sajnani, Lajwanti S., Appellant
129. Sajnani, Sunder K., Appellant
130. Santos, Edwin, Jr., Appellant
131. Santos, Elba I., Appellant
132. Santovenia, Lorenzo, Appellant
133. Santovenia, Theresa, Appellant
134. Sborz, John, Appellant
135. Sborz, Tina, Appellant
136. Schrems, Manhgiaio Elkins, Appellant
137. Sherwood, Donald R., Appellant
138. Sholl, Peter J., Assistant United States Attorney, appellate counsel for  
the United States
139. Shrum, Nicholas W., Appellant
140. Sibole, Gale R., Appellant
141. Sibole, Gladys V., Appellant
142. Simko, Chris, Appellant

143. Simmons, Barbara, Appellant
144. Simmons, Theodore, Appellant
145. Singleton, Christopher, Appellant
146. Singleton, Lisa, Appellant
147. Slonsky, Charles Christopher, Appellant
148. Solutions Processing, Inc.
149. Sparks, Dianne, Appellant
150. Sparks, Gary, Appellant
151. Spratley, Cynthia A., Appellant
152. Spratley, Mark W., Appellant
153. Stewart, Janis W., Appellant
154. Stover, David B., Appellant
155. Stover, Judith T., Appellant
156. Suarez, Eduardo A., District Court Counsel to John Robert Miller
157. Suarez, Robert A., Appellant
158. Tannenbaum, Alan E., Counsel for Appellants
159. Taudte, John, Appellant
160. Testa, John, Appellant
161. Tyree, Crawford, Appellant

- 162. Uber, Richard J., Appellant
- 163. Villa, Judson Thomas, Appellant
- 164. Walsh, Tim, Appellant
- 165. Williams, Kevin, Appellant
- 166. Wolfe, G. Larry, Appellant
- 167. Wood, Michael P., Appellant
- 168. Yanes, Katherine Earle, Counsel for Defendant Philip W. Coon

A handwritten signature in cursive script, appearing to read "James E. Felman", is written over a horizontal line.

James E. Felman

Attorney for Defendant Philip Coon

## **TABLE OF CONTENTS**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
CERTIFICATE OF INTERESTED PERSONS .....	C-1 of 10
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
REPLY MEMORANDUM .....	1
I.    There is a factual dispute as to whether the borrowers were overcharged. ....	1
II.   The procedure by which the borrowers were determined to have been “overcharged” violated Coon’s due process rights ....	3
III.  Mandamus rehearing may be granted without meeting the standard required for recall of a mandate .....	5
CERTIFICATE OF SERVICE	
ADDENDUM (Borrowers’ “supplemental authority”)	

## **TABLE OF AUTHORITIES**

### **CASES**

### **PAGES**

*Carnegie-Mellon Univ. v. Cohill,*

484 U.S. 343 (1988) ..... 5

*Ellis v. United States Dist. Ct. for the W. Dist. of Wash.,*

360 F.3d 1022 (9th Cir. 2004) ..... 5

*In re Horseshoe Entm't,*

337 F.3d 429 (5th Cir. 2003) ..... 5

*In re Union Nacional de Trabajadores,*

527 F.2d 602 (1st Cir. 1975) ..... 5

*United States v. Denson,*

603 F.2d 1143 (5th Cir. 1979) ..... 5

**I. There is a factual dispute as to whether the borrowers were overcharged.**

The panel found that the borrowers were victims because the offense caused them to be “overcharged” – that is, their mortgages increased due to the additional point. Coon’s petition for rehearing asserts that the panel majority adjudicated this factual question incorrectly. Coon asserts that the borrowers were *not* overcharged, and that their loans did not increase as a result of the extra point because (1) the purchase prices and loan amounts were determined solely by the homes’ appraised values, and (2) the additional point was paid by the seller and not the buyer. Further, Coon asserts that he was deprived of any opportunity to prove his assertions because the district court denied the borrowers’ motion before he could respond to it. In their response, the borrowers do not – and could not – dispute that Coon had no opportunity to rebut the borrowers’ evidence or present any evidence himself. Rather than concede the need for an evidentiary hearing, the borrowers assert no hearing is needed because the panel (1) relied only on facts Coon stipulated to in the district court, and (2) accepted as true all of Coon’s proffered facts in the mandamus proceeding. For the reasons discussed below, neither of these assertions is correct.

The borrowers claim the panel relied only on Coon’s information, plea agreement, and guilty plea. Res. at 3.<sup>1</sup> This is incorrect. The panel limited its review

---

<sup>1</sup>These, of course, are the *only* materials this Court *could* rely on given the absence of an evidentiary hearing.

to these materials only in part I of its ruling, but neither these materials nor part I supports a finding that the borrowers were overcharged. And the plea agreement's stipulated facts establish the opposite – that the additional point “did not affect the amount paid by the borrower as the builder/seller was responsible for the payment of all closing costs.” Mand. Ex.4 at 18.<sup>2</sup> Knowing the stipulation is fatal, the borrowers say it “obviously means what the borrowers have stated all along: that the overcharge did not affect the cash paid by the borrowers *at closing*, as the builder fronted the closing costs by drawing these funds out of the borrowers' loans.” Res. at 5-6. This is hardly “obvious.” That the additional point “did not affect the amount paid by the borrower” means what both Coon and the United States have stated all along: that the borrowers were not overcharged. *See, e.g.*, U.S. Pet. Panel Reh'g at 7, M-D 28.<sup>3</sup> The borrowers further assert that the stipulation “in no way undermines the panel's conclusion that the borrowers suffered harm by being placed on the hook for larger loan amounts owed to Coast Bank.” Res. at 6. But if the extra point “did not affect the amount paid by the borrower,” this would in *every* way “undermine” the panel's

---

<sup>2</sup>The plea colloquy similarly contains the assertion by Coon's counsel that the borrowers were not victims because they “suffered no loss.” Mand. Ex.9 at 30-31.

<sup>3</sup>The remainder of the stipulation – that “the builder/seller was responsible for the payment of all closing costs” – means that the borrowers did *not* have to pay them (ever). This has nothing to do with the closing – it has only to do with who had to pay the extra point and it was the seller and not the buyer/borrower who did so.

conclusion that the point put the borrowers “on the hook for larger loan amounts.”

The borrowers’ second reason no hearing is needed is the claim that the panel accepted as true all of Coon’s proffered facts in his response to the mandamus petition. Res. at 4, 5, 9. This is not correct. Coon’s response proffered the following:

Ms. Stewart did not either borrow or pay any more money for her house as a result of this offense. ... The price Ms. Stewart agreed to pay for her home – \$333,000 — would have been the same without regard to whether the seller paid one point, two points, or any number of points as closing costs.

Ms. Stewart was obligated to repay the \$333,000 she borrowed not because that amount included the extra point charged by AML but because that was the price of the home she purchased from the seller.

[T]he borrowers were responsible for paying the purchase price of the home, and that price did not vary depending on whatever closing costs were incurred by the seller. Simply stated, not a single borrower paid or borrowed a nickel more as a result of the extra point paid by the seller.

[T]he sales prices of the homes were based strictly on 90% of their appraised value. Mr. Coon’s bank was willing to and did provide 100% financing on these transactions based on the agreement of the seller to price them at 90% of their appraised value. Thus, the sales price of the homes were set strictly by their appraised value, were unaffected by the additional point paid by the seller, and these facts would be established in the event an evidentiary hearing were required.

Mand. Res. at 5, 8-9, 19, 21-22. The borrowers do not address any of the above facts, each of which conflicts with a finding that the borrowers were overcharged.

**II. The procedure by which the borrowers were determined to have been “overcharged” violated Coon’s due process rights**



Coon's rehearing petition asserts that the panel finding that the borrowers were overcharged violated his rights because the district court decided their motion before he could respond to or offer evidence rebutting it and because this Court offers no forum in which to put on evidence in the first instance. Pet. at 9. The borrowers ignore this point<sup>4</sup> and discuss only a different one – the extremely abbreviated time Coon had to respond to the mandamus petition.<sup>5</sup> The borrowers simply have no answer to the glaring due process violation caused by the failure to afford Coon an evidentiary hearing for which a mandamus proceeding cannot substitute.

The borrowers also assert Coon has not been harmed by, and indeed may even lack standing to challenge, the panel ruling because it “simply afforded the borrowers’ procedural rights in the sentencing process,” including the right “to seek restitution.” Res. at 9-10. While asserting this, the borrowers filed as “supplemental authority” correspondence asserting the opposite – that the panel ruling establishes

---

<sup>4</sup>The borrowers are also silent regarding Part III of Coon's en banc petition, which explains the panel's error in determining victim status based on “relevant conduct” rather than the elements of Coon's offense, in conflict with well-settled precedent construing the analogous definition of “victim” under restitution law.

<sup>5</sup>Having erected this straw man, the borrowers then knock it down by saying Coon could have prepared a response to the mandamus petition before it was filed. It is not possible to respond to a petition without seeing it. And contrary to the borrowers' claim, Res. at 8, their petition did not track their district court position, which was not that they were victims under the plea agreement's facts, but that those facts were false and that the government had charged the wrong crime. Mand. Ex.10.

the borrowers' "right to restitution" in the amount of the extra point regardless of whether they paid it. Coon agrees that the ruling does not fully adjudicate restitution because borrowers could be victims under the CVRA if they suffered "harm" by being obligated to repay higher loans without being entitled to restitution, which would require a "loss" that would occur when the loan, including the extra point, was fully repaid.<sup>6</sup> But Coon's rights have been violated because the panel adjudicated the disputed first step in this analysis without affording Coon an evidentiary hearing.<sup>7</sup>

### **III. Mandamus rehearing may be granted without meeting the standard required for recall of a mandate**

The borrowers argue that the mandamus order was a "mandate"<sup>8</sup> that can be reheard only if the standard for mandate recall is satisfied. They are incorrect. There is ample precedent for granting rehearing in a mandamus case,<sup>9</sup> and the undersigned did not find any case setting a heightened standard for mandamus rehearing.

---

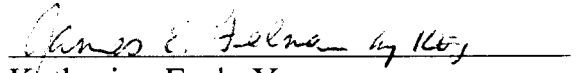
<sup>6</sup>The borrowers admit that only "some" of them repaid the extra point and that "many" of them did not. Mand. Ex.10 at ¶¶21,22.

<sup>7</sup>The same is true regarding potential guidelines issues, as the definition of "victim" under the guidelines is similar to that in the restitution statutes.

<sup>8</sup>There is conflicting authority regarding whether a mandamus order is a "mandate." Compare *Ellis v. United States Dist. Ct. for the W. Dist. of Wash.*, 360 F.3d 1022, 1022 (9th Cir. 2004) (en banc), with *In re Union Nacional de Trabajadores*, 527 F.2d 602, 603 (1st Cir. 1975).

<sup>9</sup>See, e.g., *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988); *In re Horseshoe Entm't*, 337 F.3d 429, 430 (5th Cir. 2003); *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979).

Respectfully submitted,



Katherine Earle Yanes

Florida Bar No. 159727

James E. Felman

Florida Bar No. 0775568

Kynes, Markman & Felman, P.A.

P.O. Box 3396

Tampa, FL 33601-3396

(813) 229-1118

Attorneys for Defendant

Philip Coon

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply has been furnished by U.S. Mail on  
February 13, 2009, to:

Honorable Elizabeth J. Kovachevich  
United States District Court  
Middle District of Florida  
801 North Florida Avenue  
Tampa, FL 33602

Honorable Mark A. Pizzo  
United States Magistrate Judge  
Middle District of Florida  
801 North Florida Avenue  
Tampa, FL 33602

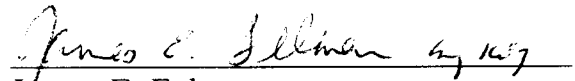
Rachelle DexVaux Bedke  
David P. Rhodes  
Peter J. Sholl  
Assistant United States Attorney  
400 North Tampa Street, Suite 3200  
Tampa, FL 33602

Marcelino J. Huerta, Esquire  
109 North Brush Street, Suite 200  
Tampa, FL 33602

Paul Cassell, Esquire  
332 South 1400 East, Room 101  
Salt Lake City, UT 84112

Alan E. Tannenbaum, Esquire  
Levin Tannenbaum  
1680 Fruitville Road, Suite 102  
Sarasota, FL 34236

Meg Garvin  
National Crime Victim Law Institute  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219

  
James E. Felman